No. 93-849

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MERL E. BLAIR,

Petitioner,

VS.

GRAHAM CORRECTIONAL CENTER;
ILLINOIS DEPARTMENT OF CORRECTIONS; AND
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 2856,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer's obligation of religious accommodation under Title VII (§ 701(j)) is satisfied solely by the implementation of a seniority-based scheduling system.

2. Whether the holding of *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), excuses an employer's nonaccommodation of a religious practice if the method of accommodation is not specifically described in a labor contract, even though the accommodation (i) is not prohibited by the contract, (ii) does not cost the employer more than a *de minimus* amount and (iii) does not deprive any other employees of seniority rights or benefits.

3. Whether an employer is entitled to summary judgment based on the theoretical hardship of having one less employee available, when an employer does not replace the employee who is absent because of sincerely-held religious beliefs, the employer cannot identify any added costs caused by the employee's absence, and no provisions of the collective bargaining agreement are violated.

4. Whether an employer's attempted accommodation, which did not remove the conflict between religion and employment, satisfies such employer's obligation to reasonably accommodate the employee's religious practice under Title VII (§ 701(j)), when other methods of accommodation were available but were ignored by the employer.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Merl E. Blair, the petitioner, and Graham Correctional Center, Illinois Department of Corrections, and the American Federation of State, County and Municipal Employees, Local 2856, the defendants. A writ of certiorari as to the judgment in favor of Local 2856 is not being requested. Only Graham Correctional Center and the Illinois Department of Corrections are respondents in this proceeding.

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AMERICAN FEDERATION OF STATE, COUNTY AND
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Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Merl E. Blair petitions for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals. The opinion and judgment of the court of appeals were entered in this case on September 1, 1993.

OPINIONS BELOW

The judgment of the Seventh Circuit Court of Appeals affirmed the judgment of the District Court

for the Central District of Illinois dated February 10, 1992, which was based on an opinion and order issued February 5, 1992. The Court of Appeal's judgment is unpublished. The judgment of the court of appeals and the judgment and opinion of the District Court are reprinted in the Appendix herein at 1a-7a and 8a-13a, respectively, *infra.*

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, under 28 U.S.C. § 1331 (general federal question jurisdiction), and under 28 U.S.C. § 1343(a)(4) (jurisdiction over Acts of Congress protecting civil rights), the petitioner brought this suit in the United States District Court for the Northern District of Illinois on October 12, 1990. The case was transferred to the United States District Court for the Central District of Illinois where the District Court entered summary judgment in favor of the respondents and against petitioner, Merl E. Blair, on February 10, 1992. *See* 8a, *infra.*

On petitioner's appeal, the United States 7th Circuit Court of Appeals on September 1, 1993, entered an order affirming the district court judgment. *See* 1a, *infra.*

The jurisdiction of this court to review the judgment of the Court of Appeals for the Seventh circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e(j) provides:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences

are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, ...

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner, Merl E. Blair, was hired by respondent, Illinois Department of Corrections ("DOC"), to work at respondent, Graham Correctional Center ("Graham") in Hillsboro, Illinois, on May 29, 1984. (References herein are to the District Court Docket; Docket No. 1-12, 14, Complaint and Answer of Employer, paragraph 7) He advised Graham prior to his hiring that he was a Seventh-day Adventist and that because of religious beliefs, he could not work from sundown Friday night to sundown Saturday night. (Docket No. 1-12, 14, paragraph 9) For the first six months of his employment while he was on probationary status, Blair was accommodated in his religious observances. (Docket No. 41, page 3) After the first six months, he became subject to the terms of the collective bargaining agreement between Graham and respondent, American Federation of State, County and Municipal Employees, Local 2856 ("Local 2856"). There are no terms in the contract relating to days off for religious observances, but there are paid personal days and limited amounts of vacation time provided. (Docket No. 29, attachment)

Blair suggested methods of accommodating his religious observances available to Graham and Local 2856. These included attempts at arranging voluntary swaps, the allowance of "dock time" (unpaid approved

time off), transfer to another location, transfer to another position within Graham and allowing absences without discipline. (Docket No. 44, pages 1-4)

Dock time was provided for under the respondent's work rules and institutional directives. (Docket No. 44, Exhibit A, pages 71-72) Local 2856's then current president testified at a Civil Service Commission hearing that Blair should have been accommodated under the dock time provisions. (Docket No. 44, Exhibit A, pages 69-70) However, dock time was not granted.

Blair alleged that DOC opened new prisons into which he, with his accumulated seniority, could have moved in a position where his religious convictions could more easily have been accommodated. (Docket No. 44, pages 2-3) However, Graham and DOC gave no notice of the opening of the prisons to Blair nor were the openings posted as was the usual procedure. Graham claimed that Blair should have been aware of the new facilities "by word of mouth or by listening to the media." (Docket No. 41, page 10)

Blair also alleged that a job became available at the Industrial Factory within the Graham Correctional Center, but was awarded without posting to the then union president's brother, who had less seniority than did Blair. (Docket No. 44, page 3)

Blair used his vacation time and personal days to the maximum to avoid work on his Sabbath but was absent without Graham's consent on occasion, for which he was disciplined. His employment was terminated on June 9, 1988, for excessive absenteeism related to his religious practices. (Docket No. 1-12,14)

B. Respondents' Motions for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(b), two earlier individual defendants, Alethea T. Camp,

the prison warden, and Kenneth L. McGinnis, the director of the Illinois Department of Corrections, moved for summary judgment on September 25, 1991, claiming qualified immunity against lawsuits. On October 27, 1991, the defendant, American Federation of State, County and Municipal Employees, Local 2856, filed a motion for summary judgment alleging that an accommodation of the petitioner's religious exercises would require a violation of the collective bargaining agreement with the Illinois Department of Corrections.

On December 4, 1991, the parties argued the motions by telephone conference call, and the magistrate, finding questions of fact, requested petitioner's counsel to prepare proposed findings and recommendations regarding the motions for summary judgment in accordance with the magistrate's findings. This was done. However, without following the usual procedure for the proposed findings to be finalized and provided to the judge, the judge on December 20, 1991, entered an order dismissing respondents, Camp and McGinnis, as being unnecessary because their employers were also parties. The judge instructed the respondents that they were missing the "real issue" which according to him was "whether in view of the nature of a correctional center which requires a full staff every hour of every day including Sabbaths and holidays and the collective bargaining agreement, respondents made 'reasonable accommodations' for petitioner's religious practices."

The court gave the respondents thirty days to file a second motion for summary judgment addressing the issue outlined by the court in its order. Respondents Graham Correctional Center and the Il-

linois Department of Corrections, filed such a motion on January 21, 1992. Petitioner responded opposing the motions for summary judgment, but on February 5, 1992, the day the court received petitioner's response to the motions, the court entered its six-page opinion and order granting the respondents motion for summary judgment.

C. District Court's Opinion.

The district court specifically found:

1. Graham Correctional Center's warden attempted to accommodate the petitioner's religious beliefs by contacting the union and attempting to have Blair placed in another job or agency. (*See* 9a, *infra*);

2. Petitioner used his personal days, sick days and compensatory holidays to observe his Sabbath. (*See* 9a, *infra*);

3. Petitioner was discharged on June 9, 1988, for excessive absenteeism. (*See* 10a, *infra*);

4. Respondents, Graham Correctional Center and Illinois Department of Corrections, made reasonable accommodation of Blair's religious beliefs when they attempted without success to work with the union and other agencies to have Blair reassigned. The accommodation of Blair's religious exercises would have meant that the shift in job preference of other employees would have been denied and they would have been denied their contractual rights. No support from the record for such finding was cited by the court.

5. The court did not address the issue of "dock time" (time off without pay) which petitioner and Local 2856 thought should have been used to accommodate petitioner's religious exercises.

6. The court dismissed petitioner's suggested accommodation of voluntary shift swapping as something which as a matter of law the respondents had no duty to attempt to arrange.

The court concluded that summary judgments as to all parties were appropriate and accordingly granted them. A judgment in a civil case was entered on February 10, 1992.

D. Order of the Court of Appeals.

The court of appeals held that the lower court's ruling that the petitioner's claim was controlled by *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), was warranted. The court opined as follows:

1. Petitioner had not produced any evidence that he could have arranged a swap had he been permitted to do so. (See 5a, infra)

2. Allowing the petitioner to have dock time would have required the respondents to hire another employee to work in petitioner's absence or pay a current employee overtime. There is no reference to the record in substantiation of this finding. (See 5a, infra)

3. Graham would have had to abandon its seniority system to accommodate the religious practice of the petitioner, again without reference to any record source. (See 6a, infra)

4. The respondents' seniority system represented a significant accommodation to the religious needs of respondents' employees. (See 6a, infra)

REASONS FOR GRANTING THE WRIT

Introduction

All parties to this proceeding agree that the legal issues involved are of continuing public interest. See 15a, *infra*. Requiring individuals to choose between their employment and their religion is a matter of great importance in a nation where the majority of the people claim to be religious.[1] Recently several cases have been adjudicated by federal courts involving such situations, and the termination of the Sabbatarians' employment has been approved, some, including the instant case, on summary judgment. *Rasch v. National Railroad Passenger Corporation, D/B/A Amtrak*, 993 F.2d 913 (Table) (D.C. Cir. 1993) (Cert. denied); *Billy W. Lee v. ABF Freight System, Inc.*, unpublished, on appeal to the 10th Circuit from the U.S. District Court of New Mexico, Civil Action No. 91-1254 JC/RWM; *Mann v. Frank*, unpublished opinion, No. 92-3030, (8th Cir. 1993), *Wright v. Runyon*, unpublished opinion, 62 F.E.P. Cases 865, No. 92-3490 (7th Cir. 1993), *Cook v. Chrysler Corporation*, 981 F.2d 336 (8th Cir. 1992) (cert. denied, 113 S.Ct. 2963); *James E. Jewell v. American Telephone and Telegraph Co. DBA AT&T Network Systems*, Civil Action No. 1:92-CV-174-RHH (N.D. Geo. 1993); *Aston A. Beadle v. Hillsborough County Sheriff's Office AKA Hillsborough County Sheriff's Department and Walter C. Heinrich, as Sheriff of Hillsborough County, Florida*, Civil Action No. 91-325-CIV-T-99(A) (N.D. Fla. 1993); and *Aston A. Beadle v. City of Tampa, Florida, a Florida Municipal Corporation and the City of*

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[1] Garry Wills, *Under God: Religion and American Politics* (Simon and Schuster, 1990), p. 16.

Tampa, Florida Police Department, Civil Action No. 91-1316-CIV-T-17(A) (N.D. Fla. 1993).

Trial and the appellate courts have relied heavily on this court's opinion in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). Since the *Hardison* case, this court has visited the dimensions of Title VII accommodation of religion only once. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). *Hardison* considered the duty to accommodate religion when all accommodations created hardship for the employer and *Ansonia* considered the selection of an accommodation when more than one was available. None of these cases present the situation in the instant case where the employer declined to implement any viable accommodations. Because of some courts' misreading of the *Hardison* case, unjust results, contrary to the congressional purpose of § 701(j) of Title VII of the Civil Rights Act, have occurred.

There is a conflict of views among circuits regarding whether a "significant accommodation" as that term was used by this court in *Hardison* is equivalent to "reasonable accommodation" as that term is used in § 701(j). For the Fourth and Sixth Circuit Courts of Appeal the existence of a seniority system does not automatically constitute a reasonable accommodation, while in the Eighth Circuit and, in view of the instant case, also the Seventh Circuit, a seniority system that does not eliminate the conflict between religion and employment still constitutes a reasonable accommodation. If the Seventh and Eighth Circuits are correct and the Fourth and Sixth Circuits wrong, Sabbatarians are not being provided the relief intended by the Congress in enacting § 701(j). See 13, 14, *infra*, and Sabbatarians have a very limited job

market considering the number of employers covered by collective bargaining agreements, and substantially less employment opportunity when compared with nonsabbatarians. A clarification of the breadth of the opinion in *Hardison* on the treatment of seniority as an accommodation of religion, and an explanation of the relationship, if any, between a "significant accommodation" and a "reasonable accommodation" are vital to the public interest and the application of § 701(j).

I. The adoption of a neutral scheduling system, such as seniority, does not fulfill an employer's obligation of religious accommodation under Title VII (§ 701(j)).

This court in *Hardison*, *supra*, in discussing seniority systems said, "[T]he system itself represented a significant accommodation to the needs, both, religious and secular, of all of TWA's employees." What is the difference between a "significant accommodation" and a "reasonable accommodation"? Petitioner posits that there is a significant difference. A significant accommodation may not be a reasonable one depending on the facts of each case. The Seventh Circuit Court of Appeals, citing this court's language in *Ansonia*, *supra*, defined a reasonable accommodation of an employee's religious practices as being "one that 'eliminates the conflict between employment requirements and religious practices'". *Wright v. Runyon*, *supra.*, at 9. The Sixth Circuit concurs as is demonstrated in *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), by holding that while allowing an individual to find other employees to work in his place would normally be a reasonable accommodation, it was not such where Smith's beliefs also

prevented him from obtaining a substitute, and thus did not eliminate the conflict between religion and employment for Smith.

As described above, the Sixth Circuit obviously holds that the existence of a seniority system does not necessarily constitute a reasonable accommodation; the accommodation must eliminate the conflict between religion and employment. In accord with this view is the Fourth Circuit. It said in *EEOC v. Ithaca Industries*, 849 F.2d 116 (4th Cir. 1988) (Cert. denied, 488 U.S. 924 (1988)):

> The district court's conclusion that unless Dean was willing to compromise his religious belief by agreeing to work Sundays on some occasions, Ithaca had no duty to attempt to accommodate the belief turns the statute on its head. It improperly places the burden on the employee to be reasonable rather than on the employer to attempt accommodation. Section 701(j) clearly anticipates that some employees will absolutely refuse to work on their Sabbath and this firmly held religious belief requires some offer of accommodation by employers.

Thus, the employer's seniority system was not enough to be a reasonable accommodation of the employee's religious practices. The facts of each situation determine what is reasonable.

In the instant case the court of appeals held that the petitioner had not distinguished this case from *Hardison* and quoted the language from *Hardison* describing seniority as being a "significant accommodation." The differences between *Hardison* and the instant case are discussed below, but the Seventh Cir-

cuit along with the Eighth Circuit are misconstruing the meaning of "significant accommodation". In *Cook v. Chrysler Corp., supra*, at 9, the court, relying on *Hardison* and *Johnson v. Angelica Uniform Group, Inc.*, 762 F.2d 671 (8th Cir. 1985), held that a Sabbatarian was accommodated by the bargaining agreement, coupled with the "book" method for obtaining days off even though the conflict between religion and employment was not resolved. In *Johnson*, at 674, the court, citing *Hardison*, in *dicta* said, "We agree with the district court that the collective bargaining agreement in effect here provided reasonable accommodation of Johnson's religious needs." In *Mann v. Frank*, supra, the Eighth Circuit disposed of a Sabbatarian's argument for a reasonable accommodation by saying at page three, "In the instant case, the seniority system and the voluntary ODL represented a nondiscriminatory vehicle for minimizing the number of occasions when an employee would be called upon to work an overtime shift on a day that he or she preferred to have off."

The arguments of the Seventh and Eighth Circuits that a neutral system of assigning working days and times constitutes a reasonable accommodation of religion are very similar to the decision prior to the enactment of § 701(j) in *Dewey v. Reynolds Metals Company*, 429 F.2d 324, 329 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689 (1971):

> We find nothing discriminatory in the provisions of the collective bargaining agreement or in the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the em-

> ployees without discrimination against any or them.

Section 701(j) was added to the Civil Rights Act precisely to reverse this result and to require *accommodation* not just *nondiscrimination*. When § 701(j) was introduced in the U.S. Senate, Senator Randolph said:

> Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some ways. So in presenting this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.
>
> . . . .
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts have not resolved.

Sen. Randolph included materials supporting his statement with the introduction of § 701(j). The first exhibit was the Sixth Circuit opinion in *Dewey*. Randolph's colleagues in the Senate obviously agreed with him, unanimously adopting § 701(j). 118 Cong. Rec. 705, 706, 730 and 731.

The intent of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, requires accommodation, which is more than

nondiscrimination. By providing that a seniority system need not be violated to accommodate religion, § 701(j) obviously set in place an accommodation standard which cannot be satisfied by the mere presence of a seniority system and nothing more. If this is not true, the protection in § 701(j) for seniority systems is superfluous. There is no need to discuss violation of a seniority system if that system, standing alone, would satisfy the duty to accommodate. The position of the Seventh and Eighth Circuits that neutral systems of scheduling such as seniority and other bargaining agreements satisfy the employer's obligation of accommodation under § 701(j) is wrong and totally frustrate congressional intent.

II. An employer's accommodation of religious practice is consistent with the holding of *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), even if an accommodation of religion is not specifically provided as such in a labor contract, if the accommodation is not prohibited by the contract, does not result in more than *de minimus* cost and does not deprive other employees of seniority rights or benefits.

The respondents' accommodation of the petitioner's religious practices would not have violated the collective bargaining agreement, cost respondents' more than a *de minimus* amount, or deprived any employee of any rights or privileges. The petitioner claimed that he could be allowed "dock time" which was time off without pay. The court of appeals dismissed this suggested accommodation by saying that such an arrangement would have required additional employees or overtime. (Infra, 5a) However, the testimony of the respondents' warden, Local 2856's president and petitioner at administrative hearings all confirmed

that on none of the over 200 Sabbaths that petitioner did not work during the term of his employment did respondents call in additional employees or incur any overtime costs. The record does not support the court of appeals' conclusion. There is no showing that any employee was deprived of any rights or privileges due him or her under the contract or work policies. Having allowed petitioner to take dock time, as the president of Local 2856 testified should have been done, would have in essence been the same procedure respondents used during the four years of petitioner's employment. Such an accommodation would have been consistent with the principles enunciated in *Hardison*. Different treatment is not necessarily preferential treatment. Time off without pay is a reasonable accommodation of religion. *Ansonia v. Philbrook*, *supra* at 10. It cannot be assumed that an accommodation that is not expressly provided in a collective bargaining agreement will necessarily violate it. Such an assumption by the lower courts is erroneous, unsupported by the record and contrary to the intent of Congress in enacting § 701(j).

III. An employer is not entitled to summary judgment based on the theoretical hardship of having one less employee available, when an employer does not replace the employee who is absent because of sincerely-held religious beliefs and the employer cannot identify any added costs caused by the employee's absence.

As the court of appeals properly held, petitioner established a *prima facie* case. (Infra, at 3a) It then became the duty of the respondents to show that each reasonable accommodation would cause undue hardship. § 701(j).

The respondents never produced evidence of hardship. The court of appeal's assumption of the existence of hardship was only theoretical at best. A theoretical or speculative hardship does not rise to the level of undue hardship under § 701(j). *Brown v. General Motors*, 601 F.2d 956 (8th Cir. 1979) and *Smith v. Pyro Mining Co.*, *supra*, at 11. Petitioner's absence on his Sabbath for four years without causing additional employment or overtime and Local 2856's support casts in a very speculative light the lower courts' unsupported conclusion that the petitioner's absence caused undue hardship.

IV. An employer's attempted accommodation which did not remove the conflict between religion and employment does not satisfy the employer's obligation to reasonably accommodate the employee's religious practices under Title VII (§ 701(j)), when "other methods of accommodation are available but are ignored by the employer.

A reasonable accommodation of religion is one that eliminates the conflict between employment and religion. *Wright v. Runyon*, *supra*, at 9 and *Ansonia v. Philbrook*, *supra*, at 9. The respondents never suggested any accommodation which relieved that conflict. Petitioner suggested the "dock time" accommodation as well as a move to the prison industries and other prison locations which he could have moved into with enough seniority to accommodate his religious practices. Respondents should not be heard to say that all reasonable accommodations were accompanied with undue hardship when they claimed as accommodations procedures which did not accommodate and did not attempt or engage in actions suggested to them which would have eliminated

the conflict between petitioner's religion and his employment. The lower courts were in error in finding that the respondents made a reasonable accommodation—they did not.

SUMMARY

This court should grant certiorari to resolve the different concepts of "reasonable accommodation" among the circuits and to assure compliance with § 701(j). Further, direction from this court is needed for employers and employees to better understand their rights and obligations in instances of conflict between religious practice and employment.

The lower courts' concept of reasonable accommodation totally removes substantive meaning from § 701(j) and frustrates congressional intent in enacting it. Petitioner was given nonaccommodating "accommodations," was denied an attempt to implement his suggested accommodations, and was denied a trial on the many factual issues that are attendant with religious accommodation cases.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

Dated: November 29, 1993

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 90 C 3030
Richard Mills, Judge

MERL E. BLAIR,
Plaintiff-Appellant,

v.

No. 92-1597

GRAHAM CORRECTIONAL CENTER, LOCAL 2856 AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, and ILLINOIS DEPARTMENT OF CORRECTIONS,
Defendants-Appellees.

Argued June 1, 1993
Decided September 1, 1993.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division

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Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY,Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

ORDER

In 1984, the Illinois Department of Corrections hired Merl E. Blair as a correctional officer in the security department at the Graham Correctional Center ("Graham").

Blair informed his supervisors that he was a Seventh Day Adventist and could not work on his Sabbath, from sundown Friday to sundown Saturday. For the first six months of Blair's employment, he was on probationary status and Graham officials were able to arrange his schedule so that he could have Friday nights and Saturdays off. Once Blair successfully completed his probationary period he became a regular employee subject to the labor contract between Graham and the American Federation of State, County, and Municipal Employees, Local 2856 ("Union"). Under the scheduling rules of that labor contract, Graham employees bid for which schedule they would work, with the more senior employees under seniority provisions selecting first. Because weekends off was the preference of most employees, Graham was no longer able to accommodate Blair's religiously-inspired scheduling needs. Blair because of his religious beliefs and thus self-imposed absences was eventually discharged for excessive absenteeism.

Blair filed a lawsuit charging that Graham, the Illinois Department of Corrections and the Union violated Title VII of the Civil Rights Act of 1964 by failing to accommodate his scheduling preference and then discharging him. Specifically, Blair alleged that Graham violated 42 U.S.C. § 2000e-2(a)(1), which, in pertinent part, makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . ." Blair alleged that the Union had violated 42 U.S.C. § 2000e-2(c)(1), which, *inter alia*, makes it unlawful for a labor organization to discriminate against one of its members on the basis of religion.

In order to establish a *prima facie* case of religious discrimination, Blair must show that (1) a bona fide religious practice conflicts with an employment requirement, (2) he brought this practice to his employer's attention, and (3) the religious practice was the basis for his dis-

charge. *Wright v. Runyon,* No. 92-3409, slip op. at 4 n.4 (7th Cir. August 10, 1993). Graham concedes that Blair has made out a *prima facie* case. Therefore, the only question before us is whether Blair's discharge amounted to an impermissible discrimination in violation of Title VII. Title VII defines "religion", however, to include only those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate . . . without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

The district court, analyzing the case under § 2000e(j), granted the defendants' motion for summary judgment, ruling that Blair's claim was controlled by *Trans World Airlines Inc. v. Hardison,* 432 U.S. 63 (1977). We agree. Hardison, the plaintiff, was hired by TWA to work as a clerk in a large maintenance and overhaul base. The department he worked in operated "24 hours per day, 365 days per year, and whenever an employee's job in that department was not filled, an employee [had to be] shifted from another department, or a supervisor [had to] cover the job, even if the work in other areas . . . suffer[ed]." *Hardison,* 432 U.S. at 66-67. Under the collective bargaining agreement which determined the terms of Hardison's employment, employees bid for particular shifts, with the most senior employees having first choice of assignments. *Id.* at 67. About a year after being hired by TWA, Hardison became an adherent of a religion which required him not to work from sunset Friday to sunset Saturday. *Id.* After a brief period in which TWA was able to accommodate Hardison's scheduling needs, it became impossible to permit him to have his Sabbath off without violating the seniority bidding system. *Id.* at 68. TWA rejected a proposal that the Plaintiff work only four days per week. *Id.* Eventually, Hardison was discharged on grounds of insubordination for refusing to work his designated shift. *Id.* at 69. He sued TWA and his union claiming religious discrimination as prohibited under 42 U.S.C.

§ 2000e-2(a)(1), and by regulations eventually codified in 42 U.S.C. § 2000e(j). *Id.* at 69. Interpreting the language now contained in § 2000e(j) that employers are required to "reasonably accommodate" an employee's "religious observance or practice" unless that causes "undue hardship on the conduct of the employer's business", the Court upheld TWA's dismissal of Harding. *Id.* at 77. The Court began its analysis by noting that "TWA . . . attempted without success to find Hardison another job." *Id.* The Court then stated that the seniority system of scheduling work shifts "represented a significant accommodation to the needs, both religious and secular, of all of TWA's employees" since it was "a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off." *Id.* at 78. The Court also held that

> "TWA itself cannot be faulted for having failed to work out a shift or job swap for Hardison. Both the union and TWA had agreed to the seniority system; the union was unwilling to entertain a variance over the objections of men senior to Hardison; and for TWA to have arranged unilaterally for a swap would have amounted to a breach of the collective-bargaining agreement."

Id. at 78-79. The statutory duty to accommodate an employee's religious needs, the Court held, does not require an employer to "take steps inconsistent with the otherwise valid [collective bargaining] agreement." *Id.* at 79. Moreover, the Court observed that

> "[t]he seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion."

Id. at 82 (citation omitted). ". . . TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations. . . . To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* at 83-84; *see also Ryan v. United States Department of Justice*, 950 F.2d 458, 461 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992).

The facts of the instant case are almost identical to those found in *Hardison*. Just as in *Hardison*, Blair did not want to work from sundown Friday to sundown Saturday and he is employed in an industry (a maximum security prison) which requires a full complement of security workers, seven days per week, 24 hours per day. Blair admits that for the first six months of his employment, before he became subject to the Union contract, Graham arranged for him to have his Sabbath off. As in *Hardison*, the employer here, Graham, attempted to find another position for Blair, either within the Illinois Department of Corrections, or with another state agency. These efforts failed, but Blair concedes that they were made on his behalf. Nevertheless, Blair argues that Graham could have arranged a shift "swap" between him and another employee to accommodate his religious beliefs. However, as we noted above, any employee senior to Blair had the right to bump Blair from his preferred schedule of sundown Friday to sundown Saturday off. Blair was unable to produce any evidence that such a swap could have been successfully completed. Blair also maintains that Graham could have allowed him to take every Sabbath off without pay until he had enough seniority to obtain his preferred schedule. This arrangement would have required Graham to hire another employee to work the day each week that Blair was absent (since the prison requires full-security staffing) or else pay a current employee to work overtime. Either way, Graham would incur more than the *de minimis* cost *Hardison* declared was not required by

Title VII, as well as set an undesirable employment precedent possibly injurious to fellow employees and management in the field of personnel relations. *Hardison*, 432 U.S. at 84. *Hardison*, as we set out above, makes clear that Graham need not abandon its seniority system in order to accommodate the religious preferences of an employee, and, in fact, holds that the seniority system itself represented a "significant accommodation" to the religious needs of employees. 432 U.S. at 78. In a case involving a claim of religious discrimination made against the FBI by one of its agents, we observed that it "is difficult for any organization to accommodate employees who are choosy about assignments; for a paramilitary organization the tension is even greater." *Ryan*, 950 F.2d at 462. The same holds true for the security force of a prison. We are convinced that Graham's inability to accommodate Blair's scheduling request was not caused by animus towards him or his religious convictions, but rather by the constraints placed upon Graham by the collective bargaining agreement and the demands of managing the security force of a prison. Blair has been unable to distinguish his case from *Hardison*, and therefore the district court properly entered summary judgment on behalf of the defendants.

Blair advances several procedural arguments which require only brief comment. First, Blair makes a generalized assertion that the district court did not have sufficient facts upon which to base its summary judgment. We disagree. As we discussed above, the record created in the district court sets out the relevant facts in sufficient detail to conclude that *Hardison* required judgment in favor of the defendants. Blair also claims that the district court erred in relying for much of its factual findings on transcripts of hearings held before the Illinois State Human Rights Commission pursuant to a claim Blair filed with it arising from his dismissal. Blair makes much of the fact that the transcripts were inadmissible because they were not properly authenticated pursuant to Fed. R. Evid. 901

since the transcripts were not certified as accurate by the Human Rights Commission. However, at oral argument, Blair's counsel conceded that the transcripts made part of the record by the district court were free from error, and that they accurately represented the testimony of the relevant parties to this case. Thus, any error in the authentication of the transcripts was harmless and is not grounds for reversing a properly entered summary judgment order. *Cf. Pfeil v. Rogers*, 757 F.2d 850, 859 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). Blair also argues that the district court could not properly rely on the transcripts because they contained hearsay. This argument borders on the frivolous. Blair does not argue that the statements contained in the transcripts were themselves hearsay, but rather that because they are in transcript form they were somehow improperly used by the district court. Fed. R. Civ. P. 56(e) requires that evidentiary material submitted in support of summary judgment "shall set forth facts as would be admissible in evidence." Blair does not contend that the statements made by the various witnesses recorded in the transcripts wold not be admissible at trial. Therefore, this argument must also fall by the wayside. Finally, Blair claims that the district court erred in its management of the discovery process, specifically arguing that the court did not lift a protective order in time for him to conduct certain discovery depositions. In its brief, Graham argues that Blair waived this issue by failing to object to the entry of the protective order. Blair does not respond to this waiver argument in his reply brief, and therefore has abandoned this argument. In any event, we review the discovery decisions of district courts for abuse of discretion only, *Ross v. Black & Decker*, 977 F.2d 1178, 1185 (7th Cir.), *cert. denied*, 113 S. Ct. 1274 (1992), and our review of the record leaves us convinced that the court allowed ample time for the creation of a full record upon which to base its judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS— SPRINGFIELD DIVISION

No. 91-3030

MERL E. BLAIR,

Plaintiff,

v.

GRAHAM CORRECTIONAL CENTER; ILLINOIS DEPARTMENT OF CORRECTIONS; and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME),

Defendants.

FILED

FEB 19 1992

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

OPINION

RICHARD MILLS, District Judge:

Are a penal institution, the Illinois Department of Corrections and the prison employees' union liable under Title VII for failing to give Plaintiff a premium schedule to accommodate his religious beliefs when Plaintiff was not entitled to such a schedule under the terms of the collective bargaining agreement?

Of course not!

Summary Judgment for Defendants

I. FACTS

Graham Correctional Center is a prison located in Hillsboro, Illinois with an inmate population in excess of 1,000. Its inmates consist of men between the ages of 17 to 60 with full range of offenses including a large percentage of Class X felons. There have been violent incidents at the institution in the past. Consequently, Graham Correctional Center requires a full staff of corrections officers every hour of every day, including sabbaths and holidays.

Blair was employed as a corrections officer by the Illinois Department of Corrections beginning in May of 1984. He is a member of the Seventh Day Adventist religion which requires that its members not work from Friday sundown to Saturday sundown in order to observe the Sabbath. Blair alleges that he informed the warden of Graham Correctional Center of his religion's requirement during the employment interview. He was hired and put on probationary status which meant that he was given time off to observe his sabbath. Once the probationary period ended, Blair became a member of AFL-CIO Local 2856 and was subject to the labor agreement between his union and employer.

The labor agreement allows employees with greater seniority to "shift bump" employees with lesser seniority. Consequently, because Fridays and Saturdays are the premium days off, Blair was bumped from having his sabbath day off.

Graham Correctional Center's warden attempted to accommodate Blair's religious beliefs by contacting the union and attempting to have him placed in another job or agency. However, the union's seniority requirements prevented Blair from obtaining a different job with his sabbath off and he was not offered a job at another agency. Nevertheless, Blair allegedly used personal days, sick days and compensatory holidays in order to observe his sabbath.

Blair was ultimately disciplined, then discharged on June 9, 1988, for excessive absenteeism.

Subsequently, Blair brought suit against his employers and union under Title VII, 42 U.S.C. 2000e-2(a)(1) alleging that they intentionally and willfully engaged in unlawful employment practices by discriminating against him on the basis of his religion. The Graham Correctional Center and the Illinois Department of Corrections filed a motion for summary judgment on Count I contending that they reasonably attempted to accommodate Blair's religious beliefs. The union (AFSCME) moved for summary judgment on Count II on the basis that it did not have a duty to alter the provisions of the collective bargaining agreement with the state in order to accommodate Blair.

II. SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Unquestionably, in determining whether a genuine issue of material facts exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1988).

III. ANALYSIS

A. *Graham Correctional Center and Illinois Department of Corrections*

Title VII, § 2000e-2(a)(1) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

The initial step in a Title VII case is to determine whether plaintiff has presented a *prima facie* case. *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986). Three elements must be shown: 1) "plaintiff must how that he or she holds a sincere religious belief that conflicts with an employment requirement; " 2) "the plaintiff must have informed the employer of this conflict; " 3) "the employer must have discharged, disciplined or otherwise damaged the plaintiff." *Moore v. A.E. Staley Mfg. Co.*, 727 F. Supp. 1156 (N.D. Ill. 1989).

Once the plaintiff has established a *prima facie* case, the employer must demonstrate that it cannot accommodate the plaintiff's religious practice without undue hardship. *Moore*, at 1160. An undue hardship is anything more than a *de minimis* cost to the employer. *Baz*, at 706. In a paramilitary organization, it is even more difficult to accommodate employees who are restricted as to their assignments in view of the fact that the demands may overwhelm the organization. *Ryan v. United States Department of Justice*, No. 91-1467, slip op. at 7 (7th Cir. December 9, 1991) (mission of FBI would be injured if "reasonable accommodation" required it to reassign agents from cases in which they had a conflicting religious belief). Breaching

a collective bargaining agreement in order to accommodate an employee's religious practices is an undue hardship. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 79 (1977).

The personnel structure of Graham Correctional Center is analogous to a paramilitary organization. This Court notes the importance to the public interest in having a full staff of corrections officers on duty every hour of every day of the week, including sabbaths and religious holidays in an institution such as Graham Correctional Center. Obviously, most everyone prefers not to work weekends and holidays. However, that is one of the purposes for a collective bargaining agreement with seniority scheduling; employees put their time-in and eventually work their way up to getting the premium days off while Defendants are assured of having a full staff to guard the prison inmates year round. If Defendants were required to amend the union agreement in order to accommodate all employees religious practices, they would run the risk of having the correctional institutions undermanned, thereby endangering other employees and society. Consequently, this Court finds that Graham Correctional Center and the Department of Corrections made reasonable—albeit unsuccessful—attempts to accommodate Blair's religious beliefs when they attempted to work with the union and other agencies to have Blair reassigned.

B. The Union

As previously noted, the Supreme Court held that breaching the seniority provision in a collective bargaining agreement would impose an undue hardship upon a union. Accordingly, "[t]he breach of a provision in a collective bargaining agreement, even if it is not a seniority provision, could potentially result in greater than a *de minimis* cost to the [union]." *Moore,* at 1162.

This Court finds that the reasoning announced by the Supreme Court in *Trans World Airlines* is applicable to

an employee union: "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." *TGrans World Airlines,* at 79.

Plaintiff alleges that several other possible accommodations were available to the union in order to assist him in observing his religious beliefs, such as voluntary shift swapping with other guards. This Court finds that as a matter of law, neither Defendant had a duty to attempt to arrange swap shifts between Plaintiff and other employees. *See Ryan,* slip op. at 7.

Ergo, Defendants' motions for summary judgment on Counts I and II are ALLOWED.

Case closed.

ENTER: 5 February , 1992

FOR THE COURT:

/s/ Richard Mills
United States District Judge

APPENDIX C

No. 92-1597

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 3:91-CV-03030
The Honorable Richard Mills, Judge presiding.

MERL E. BLAIR,
Plaintiff-Appellant,

vs.

GRAHAM CORRECTIONAL CENTER; the ILLINOIS DEPARTMENT OF CORRECTIONS; and the AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2856,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.

APPELLEES' MOTION TO RECALL THE MANDATE AND PUBLISH THE COURT'S DECISION

Appellees, Graham Correctional Center and the Illinois Department of Corrections (the "Department"), by their attorney, Roland W. Burris, Attorney General of Illinois, move this Court under Seventh Circuit Rule 53(c)(3) to recall the mandate and publish the Court's final order of September 1, 1993. In support of this motion, the Department states:

1. This case is a Title VII civil rights suit against the Department and a union local representing prison guards.

The plaintiff, formerly a prison guard, claimed that the defendants violated Title VII when he was fired for refusing to work on Friday nights and Saturdays. The plaintiff claimed that the defendants did not reasonably accommodate his religious beliefs under 42 U.S.C. § 2000e-2(a)(1) (1988). On September 1, 1993, this Court issued its final order affirming the district court's grant of summary judgment to the defendants. (Exhibit A, attached).

2. As fully set forth in the attached affidavit of the Affirmative Action Coordinator of the Illinois Department of Corrections (Exh. B), this decision merits publication because it "involves an issue of continuing public interest." 7th Cir. R. 53(c)(1)(ii). Over nine thousand employees of the Department are subject to collective bargaining agreements with the union involved in this case. The very question presented by this appeal has arisen repeatedly for the Department (and, one would expect, for prison officials in Wisconsin and Indiana as well). The question has led to litigation and a closely-related question was presented to the Illinois Appellate Court. (Exh. B, ¶ 6). Publication of this Court's decision will thus give much-needed guidance to employers who must develop and apply specific employment policies within the bounds of this generally-worded statute.

For these reasons, this Court should recall its mandate and publish its decision of September 1, 1993.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General
State of Illinois

BY: /s/ Mark E. Wilson
MARK E. WILSON
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5044

EXHIBIT B

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

I, **JANET A. RICHMOND**, being first duly sworn upon oath, depose and state as follows:

1. I am the Administrator of Affirmative Action for the Illinois Department of Corrections and have served in that capacity since December of 1986. From September of 1982 to December of 1986, I was a staff attorney with the Department's Legal Services Division.

2. As Affirmative Action Administrator, I am responsible, among other matters, for the development of employment practices and policies consistent with affirmative action goals and the provision of advice to Department administrators regarding these matters.

3. The Department houses over 35,200 inmates in forty-one (41) facilities located throughout the State. Over 12,000 persons are employed by the Department. At least 9,000 of those employees are subject to collective bargaining agreements between the State and the American Federation of State, County, and Municipal Employees.

4. I am familiar with the Court's decision in ***Blair v. Graham Correctional Center,*** *92-1597*. The issue addressed in ***Blair*** appears to be one of first impression in the Seventh Circuit.

5. As Affirmative Action Administrator, I have been requested on an ongoing basis to provide advice regarding managerial duties regarding accommodation of employee religious preferences. Publication of the ***Blair*** decision would provide important guidance regarding the effect of a neutral seniority system upon religious scheduling pref-

erences and would clarify the extent of an employer's duty to accommodate religious beliefs in a prison setting.

6. I am aware of other lawsuits filed against the Department by plaintiffs seeking religious accommodations, among others, ***McColpin v. State of Illinois Department of Corrections,*** 5-92-0165, Illinois Appellate Court. The publication of the ***Blair*** decision would provide guidance to lower courts in resolving future litigation.

I HAVE READ the foregoing and affirm the facts contained therein are true to the best of my knowledge and belief.

/s/ Janet A. Richmond
JANET A. RICHMOND

SUBSCRIBED *and* ***SUBSCRIBED***
before me this 27th day of October, 1993

/s/ Martha Banks

NOTARY

OFFICIAL SEAL
MARTHA BANKS
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 23, 1995